Supreme Court of the United States.

No. 273.—October Term, 1906.

David Kawananakoa, Jonah Kalanianaole, Abigail W. Kawananakoa, and Elizabeth K. Kalanianaole, Appellants,
vs.
Ellen Albertina Polyblank, otherwise known as Sister Albertina, Trustee for Stella Keomailani Cockett, and Stella K. Cockett, sole beneficiary under said Trust.

Appeal from the Supreme Court of the Territory of Hawaii.

[April 8, 1907.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from a decree affirming a decree of foreclosure and sale under a mortgage executed by the appellants to the appellee, Sister Albertina. Haw. . The defendants (appellants) pleaded to the jurisdiction that after the execution of the mortgage a part of the mortgaged land had been conveyed by them to one Damon, and by Damon to the Territory of Hawaii, and was now part of a public street. The bill originally made the Territory a party, but the Territory demurred and the plaintiffs dismissed their bill as to it before the above plea was argued. Then the plea was overruled, and after answer and hearing the decree of foreclosure was made, the appellants having saved their rights. The decree excepted from the sale the land conveyed to the Territory and directed a judgment for the sum remaining due in case the proceeds of the sale were insufficient to pay the debt. Eq. Rule, 92.

The appellants contend that the owners of the equity of redemption in all parts of the mortgage land must be joined, and that no deficiency judgment should be entered until all the mortgaged premises have been sold. In aid of their contention they argue that the Territory of Hawaii is liable to suit like a municipal corporation, irrespective of the permission given by its statutes, which does not extend to this case. They liken the Territory to the District of Columbia, *Metropolitan R. R. Co.* v. *District of Columbia*, 132 U. S. 1, and point out that it has been a party to suits that have been before this Court. *Dawson* v. *Hawaii*, 194 U. S. 154. *Carter* v. *Hawaii*, 200 U. S. 255.

The Territory, of course, could waive its exemption, *Smith* v. *Reeves*, 178 U. S. 436, and it took no objection to the proceedings in the cases

cited if it could have done so. See Act of April 30, 1900, c. 339, § 96. 31 Stat. 141, 160. But in the case at bar it did object, and the question raised is whether the plaintiffs were bound to yield. Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. (Leviathan, c. 26, 2.) A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. "*Car on peut bien recevoir loy d'autruy, mais il est impossible par nature de se donner loy.*" Bodin, Republique, 1, c. 8. Ed. 1629, p. 132. Sir John Eliot, De Jure Maiestatis, c. 3.

As the ground is thus logical and practical, the doctrine is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended to those that in actual administration originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights. A suit presupposes that the defendants are subject to the law invoked. Of course it cannot be maintained unless they are so. But that is not the case with a territory of the United States, because the territory itself is the fountain from which rights ordinarily flow. It is true that Congress might intervene, just as in the case of a State the Constitution does, and the power that can alter the Constitution might. But the rights that exist are not created by Congress or the Constitution, except to the extent of certain limitations of power. The District of Columbia is different, because there the body of private rights is created and controlled by Congress and not by a legislature of the District. But for the Territory of Hawaii it is enough to refer to the organic act. Act of April 30, 1900, c. 339, §§ 6, 55. 31 Stat. 141, 142, 150. *Coffield* v. *Hawaii*, 13 Haw. 478. See further *Territory of Wisconsin* v. *Doty*, 1 Pinney, 396, 405. *Langford* v. *King*, 1 Mont. 33. *Fisk* v. *Cuthbert*, 2 Mont. 593, 598.

However it might be in a different case, when the inability to join all parties and to sell all the land is due to a conveyance by the mortgagor directly or indirectly to the Territory the Court is not thereby deprived of ability to proceed.

Decree affirmed.

Mr. Justice HARLAN concurs in the result.

True copy.

Test:

Clerk Supreme Court, U. S.

Nemo suo statuto ligatur necessitative
Baldus. De Leg. et Const. Digna Vox, N.
Ed. 1496, fol. 51b. Ed. 1539, fol. 61.